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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
APPELLANTS,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.,
APPELLEES.

BRIEF FOR CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY ET AL., APPELLEES.

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March 21, 1938.

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INDEX

	PAGE
OPINION OF THE COURT BELOW	1
STATEMENT OF THE CASE	2
THE ORDERS COMPLAINED OF BY APPELLANTS	3
HISTORY OF THE PROCEEDINGS BEFORE THE COMMISSION	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. Before Making the Order of April 30, 1936, All Parties Were Accorded a Full and Complete Hearing	9
II. The Rates Prescribed by the Commission Were Not Lower Than Reasonable Maxima	12
III. The Findings and Order of the Commission Are Supported by Substantial Evidence and Are Valid	15
IV. The Order of the Commission Did Not Require Drastic Reductions in the Involved Rates	19
V. The Weight to be Given the Evidence is for the Commission's Determination	21
CONCLUSION	21

TABLE OF CASES CITED.

	PAGE
Bituminous Coal to C. F. A. Territory, 46 I. C. C. 66.	14
Chicago, Rock Island & Pacific Ry. Co. v. United States, 274 U. S. 29	15
Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640	3, 4, 20
Florida v. United States, 292 U. S. 1	16
Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441	14, 15, 16
Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541	14, 15, 16
Louisville & Nashville R. R. Co. v. United States, 238 U. S. 1	15
Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282	16
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38	16
Skinner & Eddy Corporation v. United States, 249 U. S. 557	15
United States v. Northern Pacific Ry., 288 U. S. 490	11
Virginian Railway Co. v. United States, 272 U. S. 658	13, 15
Western Paper Makers' Chemical Co., *et al.*, v. United States, 271 U. S. 268	15

STATUTES CITED.

Interstate Commerce Act,	
34 Stat. L. 592	7
24 Stat. L. 379	12
34 Stat. L. 584	12
36 Stat. L. 544	12
41 Stat. L. 474	12
48 Stat. L. 1102	12
48 Stat. L. 220	13
Urgent Deficiencies Act, 38 Stat. L. 208, 220	2

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1. OPINION OF THE COURT BELOW.

The findings of fact and conclusions of law of the specially constituted District Court appear in the record at pages 161-168. (There was no opinion by the lower Court.)

2. STATEMENT OF THE CASE.

This is an appeal, under the Urgent Deficiencies Act, of October 22, 1913, Chapter 38, Stat. L., 208, 220, from a final decree of the United States District Court for the Northern District of Illinois, Eastern Division (Circuit Judge Evans and District Judges Woodward and Barnes) entered January 21, 1937 (R. 185-186).

The decree was rendered upon a bill (R. 1-15) brought by The Baltimore & Ohio Railroad Company *et al.*, against The United States of America and Interstate Commerce Commission.

The purpose of the bill was to enjoin an order of the Interstate Commerce Commission entered March 11, 1935 (R. 32, 33), and a further order of the Interstate Commerce Commission entered April 30, 1936 (R. 39, 40), whereby the Commission prescribed rates on coke from producing points in the South to destinations in Illinois, Indiana, Ohio and the lower peninsula of Michigan. Certain manufacturers and shippers of coke from producing points in the North intervened in support of the plaintiffs (R. 146-157).

The Cincinnati, New Orleans & Texas Pacific Railway Company, Illinois Central Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville and Nashville Railroad Company, operating in Southern territory, intervened in behalf of the defendants (R. 141-144). The Alabama Iron and Steel Shippers Conference, and associations of manufacturers, producers and shippers of certain commodities, in-

cluding the manufacture and shipment of coke, likewise intervened in behalf of the defendants (R. 144-146).

The District Court denied the injunction prayed for and dismissed the bill (R. 185-186).

3. THE ORDERS COMPLAINED OF BY APPELLANTS.

The orders complained of by the appellants were made by the Commission in the proceeding entitled, "Investigation & Suspension Docket No. 3985, *Coke From Alabama and Tennessee to Central Territory,*" reported in 208 I. C. C. 281 (R. 15-32), and 215 I. C. C. 384 (R. 33-38, Report on Reconsideration). The order of April 30, 1936, was entered by the Commission upon reconsideration of its report and order of March 11, 1935, and thus became substituted for the order of March 11, 1935, and is the only final outstanding order now in effect as result of said proceeding before the Commission.

4. HISTORY OF THE PROCEEDINGS BEFORE THE COMMISSION.

It will be helpful to present an historical background of the Commission's orders of March 11, 1935, and April 30, 1936, as appears from the reports of the Commission. An earlier case, dealing extensively with rates in Northern territory and with rates from Southern producing points to Northern territory, will be found reported in 194 I. C. C. 640 (R. 42-107), decided

on June 30, 1933. That case was entitled, "Investigation & Suspension Docket No. 3511, *Coke Between Points in Central and Illinois Territories,*" but there had been consolidated with that proceeding a number of complaints that had been filed by producers of coke in Northern territory, bringing in issue the reasonableness of their rates and relationship between rates prevailing in that territory and the rates from Southern producing points to Northern territory; also a complaint by producers of coke in the South, bringing in issue the reasonableness of the rates on coke from the South to the North, and the relationship to rates prevailing in the North.

After extensive hearings, the Commission made and entered its report and orders in that consolidated proceeding, 194 I. C. C. 640 (R. 42-107). In that case the Commission prescribed a mileage scale of rates for application on coke in the North. It found certain of the rates on coke from the South to be unreasonable, and by order required that rates from Southern producing points be reduced so as not to exceed a certain other mileage scale. Those two scales appear as Appendix 8 to the report of the Commission in 194 I. C. C. 640 (R. 42-107). The scale ordered applicable in the North is known as the Column 2 scale. The scale, which the carriers were required to observe as maximum from the South, is known as the Column 3 scale.

Following the orders in that proceeding, the carriers in Northern territory established for application on coke within that territory the Column 2 basis of rates, with certain exceptions (R. 17, 18). The car-

riers in the South revised their rates from the South to the North in instances where the rates from the South to the North exceeded the scale prescribed by the Commission, but made no change in rates which were lower than the Column 3 scale (R. 18, 34). Almost immediately thereafter some of the railroads operating lines in the North, and participating in the transportation of coke from the South to the North, demanded of lines operating in the South that they increase all of the rates applicable on coke from the South to the North to the basis of the Column 3 scale. Believing that this would result in establishing and maintaining a level of rates that would seriously obstruct the movement of coke from the South to the North (R. 18, 35), and thus deprive them of the substantial revenue which they were earning on such coke traffic, the Southern lines declined so to advance their rates (R. 18), not being required so to do by any order of the Interstate Commerce Commission. Seeking to compel compliance with their demands, some of the Northern lines undertook to cancel the concurrences under which Southern lines had been authorized to publish rates on coke to Northern destinations, in connection with such Northern lines, and issued new concurrences authorizing the establishment and maintenance of rates in connection with such lines only on condition that the rates be made on basis of the Column 3 scale (R. 18, 35). While this was unsatisfactory to the Southern lines, they felt compelled to respect the directions contained in the new concurrences issued to them, and tariffs were filed publishing the rates from the South to the

North on the Column 3 basis. However, in filing the tariffs with the Commission, the Southern lines and Southern shippers filed protests with the Interstate Commerce Commission and petitioned it to suspend the tariffs (R. 16).

The Commission suspended the rates, and such suspension proceeding became "Investigation & Suspension Docket 3985, *Coke from Alabama and Tennessee to Central Territory*" (R. 15, 16), in which proceeding the orders of March 11, 1935, and April 30, 1936, sought to be set aside in this case, were made and entered.

The Commission conducted an extended hearing in I. & S. Docket 3985. At that hearing the Northern and Southern railroads, and Northern and Southern producers and shippers of coke, appeared and introduced testimony (R. 202-414). In fact, all parties desiring to be heard were fully heard by the Commission. Briefs were filed and the case was orally argued by all interested parties (R. 417-509). Thereafter, the Commission on March 11, 1935, issued a report and made a certain order. This report and order were not satisfactory to the Southern railroads or the Southern producers of coke. In and by it, the Commission *permitted* the establishment of a basis or level of rates that was higher than the basis or level of rates that prevailed in Northern territory (R. 15-33). On petition of several protestants, the protestants being producers, shippers and carriers in the South, to which petitions replies were filed with the Commission by the Northern railroads, the proceeding was reopened for

reconsideration, as authorized by the Commission's Rules of Practice made pursuant to authority conferred upon it by Section 16a of the Interstate Commerce Act (34 Stat. L. 592), on the record as already made before the Commission. Neither the Southern petitioners, nor the Northern railroads or producers, petitioned the Commission for any further hearing at which new or additional testimony could be introduced.

On reconsideration, the Commission found (R. 33-38) that rates on coke in carloads from Southern producing districts to destinations in Illinois, Indiana, Ohio and the lower Peninsula of Michigan "for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix" (R. 37) thereto, which scale is the same as the Column 2 scale in Appendix 8 to the report of the Commission in 194 I. C. C. 460 (R. 42-107), and the Commission made and entered its order of April 30, 1936, to give effect to this ultimate finding (R. 39, 40). The validity of this order is here brought in issue.

SUMMARY OF ARGUMENT.

I.

Before making its order of April 30, 1936 in which the rates here involved were prescribed, the Commission afforded all parties an opportunity to be heard, and all interested parties were accorded a full and complete hearing as provided by law.

That order did not condemn rates to points which were not before the Commission.

II.

The rates prescribed by the Commission in such order of April 30, 1936 were not lower than reasonable maxima.

III.

The order of April 30, 1936 is a valid order. It is supported by substantial evidence, and therefore is conclusive.

The basis of rates therein prescribed on coke for application from southern origins to northern destinations is on the same level as that which prevails generally both in the South and in the North on this commodity, the prevailing rates thereon in the South and in the North having been in evidence before the Commission.

The evidence before the Commission also disclosed that the involved traffic moves only over the main lines of southern railroads, and therefore under favorable transportation conditions.

Any higher rates than those prescribed would have obstructed the movement from southern origins to northern destinations.

IV.

The reductions which the Commission's order of April 30, 1936 brought about were in no sense drastic. They reduced the revenues of the carriers involved, based on tests presented in evidence before the Com-

mission, less than two-tenths of one per cent, and thus substantially preserved the revenues of the carriers obtained under the pre-existing rates.

V.

The weight to be accorded the evidence presented to the Commission is a matter peculiarly for the Commission's determination.

ARGUMENT.

I.

Before Making the Order of April 30, 1936, All Parties Were Accorded a Full and Complete Hearing.

It is urged that the District Court erred in failing to find that the Commission's order of April 30, 1936 was arbitrary and unlawful, in that, as claimed, it was made without having taken or heard any evidence or facts, but made solely on petitions or pleadings on the record as already made, and thus denied petitioners the hearing provided by law. There is no contention that the Commission did not grant a full and complete hearing in *Investigation & Suspension Docket 3985,* which first resulted in the report and order of March 11, 1935. The only contention is that, after that decision was made, Southern carriers and shippers petitioned the Commission, as provided for in Rule 15 of the Commission's Rules of Practice (printed as Appendix A of this brief), established by the Commission pursuant to the provisions of Section 16a of the Inter-

state Commerce Act to the effect that "applications for rehearing shall be governed by such general rules as the Commission may establish." That rule provides that an application for rehearing, reargument or reconsideration, after decision, must be made by petition stating specifically the grounds relied upon, filed with the Commission and all parties or attorneys who appeared. Paragraph (c) of the same rule requires that the matters claimed to have been erroneously decided must be specified and the alleged errors specifically stated. The petitions of Southern carriers and shippers were filed under and in compliance with Paragraphs (a) and (c) of Rule 15. Northern carriers and Northern producers filed replies to those petitions. Neither in the petitions filed by the Southern carriers and shippers for rehearing or reconsideration, nor in the replies filed by the Northern carriers and Northern shippers, was any request made upon the Commission, as required by Paragraph (b) of Rule 15, by any party to reopen the proceeding to take further evidence. Such procedure is specifically dealt with in Paragraph (b) of Rule 15, by providing that, if the application be for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and must appear not to be cumulative. None of the parties having met the specifications of Paragraph (b) of Rule 15, the Commission was not required, under the law or its Rules of Practice, to reopen the case for the taking of additional testimony. As found by the District Court, "by order of April 15, 1936 the Commis-

sion reopened said proceeding for reconsideration on the record as it then stood" (R. 164). It clearly appears from the petitions and replies filed thereto that all parties were content to have the case finally determined upon the record before the Commission as it then stood, and the record here shows no protest or objection of any party to the Commission's order of April 15, 1936, by which it "reopened said proceeding for reconsideration on the record as it then stood." It is obvious, therefore, that the contention that the order of April 30, 1936 was made without hearing or that in making said order the Commission denied to the appellants here any hearing provided by law is wholly lacking in merit. Of them it may be said, as was said of the carriers in *United States* v. *Northern Pacific Ry.*, 288 U. S. 490, 494:

> "They sat silent and took the chance of a favorable decision on the record as made."

But it is further argued that the order of April 30, 1936 required reductions in *every* coke rate from the Southern manufacturing points to *every* destination in Central territory. But the order does not so read or require. In general terms it requires that the Column 2 rates be established to destinations (not necessarily all destinations) in Central territory, and by making its report a part of the order this general term became definite and specific by tying in with the specific rates, under suspension in I. & S. Docket 3985. It results, therefore, that the order did not condemn rates to points not involved in the suspended schedules.

II.

The Rates Prescribed by the Commission Were Not Lower Than Reasonable Maxima.

It is contended that the District Court erred in failing to find that the Commission, without lawful power or authority, required appellants to join Southern carriers in rates made lower than reasonable maxima, in order to enable Southern producers of coke better to compete with producers in the North. The Commission's order of April 30, 1936 was made to effectuate the command contained in Paragraph (5) of Section 1 of the Interstate Commerce Act (24 Stat. L. 379; 34 Stat. L. 584; 36 Stat. L. 544; 41 Stat. L. 474; 48 Stat. L. 1102). That paragraph requires that all charges made for any service rendered or to be rendered in the transportation of property shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. The Commission's finding was made under this statutory obligation. It may be conceded that the Commission was equally mindful of the duty imposed upon it by the Congress in Paragraph (2) of Section 15a of the Act, which is that, in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic. That is to say, what the Commission did was to prescribe maximum reasonable rates as found by it under the requirements of Paragraph (5) of Section 1 and

Paragraph (2) of Section 15a of the Interstate Commerce Act (48 Stat. L. 220). The mere fact that the rates prescribed by the Commission may have promoted competition or have enabled competition, which already existed, to continue surely is not sufficient to stamp such rates as lower than reasonable maxima, or otherwise to limit or restrict in any way the Commission in its exercise of informed judgment in prescribing maximum just and reasonable rates. Obviously, in view of the language of Section 15a, it was not the intention that the Act should be so administered as to obstruct the movement of traffic or destroy competition.

The validity of such a finding by the Commission is not affected, as appellants insist, by arguments or conclusions of counsel or others participating in the conduct of the proceeding before the Commission. The finding of the Commission was properly based *on the evidence* in the record, and is fully supported by substantial evidence of record, as will be shown in the next section of this brief.

A somewhat similar contention was made in *Virginian Railway Co.* v. *United States,* 272 U. S. 658. Dealing with such a contention there, this Court, at pages 665, 666, said:

> "The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines *via* the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines

on its own and connecting lines having no other outlet to the western markets. The argument is that these rates can not be considered standards of reasonableness because, as the Commission declared in the present controversy, they are 'the outcome of competitive strain and stress through long periods of development,' and, as it had stated in an earlier case, they have been made 'in practical, if not absolute, disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates,' and 'are below the level at which maximum reasonable rates might be maintained.' *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66, 122, 145. The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistentcy with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable."

Thus in the Virginian Railway case the Court refused to disturb a finding of the Commission in which it applied, as a standard to determine maximum reasonable rates, other rates which were "the outcome of competitive strain and stress through long periods of development."

III.

The Findings and Order of the Commission Are Supported by Substantial Evidence and Are Valid.

The question determined by the findings and orders of the Commission, of which complaint is here made, is in its finality whether the rates prescribed by the Commission are just and reasonable rates under the law. It is a question on which the finding of the Commission is conclusive, if supported by substantial evidence.

Illinois Central Railroad Co. v. *United States,* 206 U. S. 441;

Interstate Commerce Commission v. *Union Pacific R. R. Co.,* 222 U. S. 541;

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1;

Skinner & Eddy Corporation v. *United States,* 249 U. S. 557;

Western Paper Makers' Chemical Co. et al. v. *United States,* 271 U. S. 268;

Virginian Railway Co. v. *United States,* 272 U. S. 658;

Chicago, Rock Island & Pacific Ry. Co. v. *United States,* 274 U. S. 29;

Florida v. *United States*, 292 U. S. 1;
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282;
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38.

Appellants contend that the orders are arbitrary and unjust, contrary to the evidence of record, without support of any substantial evidence properly before the Commission, and against the indisputable character of, and the manifest weight of, the evidence. In short, the question with which the Court is concerned is whether or not there was substantial evidence to support the Commission's findings and orders. As said in the *Illinois Central case, supra,* the finding of reasonableness is a determination of a fact by a tribunal "informed by experience." And in the *Union Pacific case, supra,* "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." It is only concerned with the question as to whether the finding and order of the Commission were based upon substantial evidence to be found in the record before the Commission. On this narrow question, no difficulty will be encountered here, such substantial evidence is to be found in the reports of the Commission which only briefly summarize the more controlling facts to be found in the large record made before the Commission (R. 15-32, 33-38, 42-107).

The matter before the Commission for determination was that of a just and reasonable level of rates to be applied for the transportation of coke in interterritorial movements from producing points in the South to consuming points in the North. In the case reported in 194 I. C. C. 640 (R. 42-107), the Commission itself had prescribed a scale of rates for application within Northern territory. While the Commission had prescribed no scale for application in Southern territory, its report (R. 15-32) describes and analyzes in great detail the rate level on coke prevailing in Southern territory, as result of voluntary action on the part of the carriers. It found that the rates from Chattanooga, Birmingham and Wise County, Virginia, the three producing districts involved, to Southern destinations, are in certain instances slightly higher and in other instances lower than they would have been if made on the Column 2 basis, *i. e.,* the basis which the Commission itself prescribed for application in Northern territory, but that they averaged about the same. It found that from Chattanooga and Birmingham combined, to all destinations in Southern territory, having a population of 5,000 or more, both the present and the Column 2 rates averaged $2.96 per ton; that is to say, the Commission found the fact to be that the rate level prevailing in the South was, considered as a whole, identically the same as that prevailing in the North. What better evidence could there be, upon which to determine a just and reasonable level of rates for interterritorial application to apply on interterritorial movements of coke, than evi-

dence of the rate level prevailing intraterritorially in the two respective territories? This alone would constitute substantial evidence to support the findings and orders of the Commission.

Appellants argue that the Commission failed to test the rates by the usual standards, but tested them only by rates applicable in the North. But this contention is squarely in the face of findings contained in the Commission's reports to the contrary, as just shown. It tested the interterritorial rates, not merely by rates applicable within the North, but as well by the rates applicable within the South.

In its Report on Reconsideration of April 30, 1936 (R. 33), in justifying a finding, conclusion and order in that report somewhat different from its report of March 11, 1935, the Commission, after again discussing and reconsidering what was said in its prior report as to certain transportation and traffic density matters, said:

> "Too much weight was given in the prior report to the absence of the specific data referred to, and not enough to the established rate adjustments in Southern and Central territories and the effect rates have on the interterritorial movement of the traffic." (215 I. C. C. 384, 386)

Thus it will be seen that the Commission gave, as it should have done, great weight to the established rate adjustments in both Southern and Central territories. It would have been somewhat novel, to say the least, had the Commission found justification for an inter-

territorial rate level higher than the rate levels in the origin or destination territories, one having been prescribed by the Commission and the other voluntarily maintained by the carriers for many years.

The Commission also had before it, as its reports (R. 15-32, 33-38) show, transportation and traffic data. It found that the movement of coke, produced in the South destined to Northern consuming points, was over main lines only of Southern railroads (R. 19, 35, 36). It had before it, as its reports show, evidence of the need for the Column 2 basis of rates, so as not to obstruct the interterritorial movement of traffic (R. 35), in order that the requirement contained in Paragraph (2) of Section 15a of the Act might be met.

IV.

The Order of the Commission Did Not Require Drastic Reductions in the Involved Rates.

Appellants argue that the order of the Commission required drastic reductions in the level of interterritorial rates. But such is not the case. The Column 2 basis of rates made effective under the Commission's order of April 30, 1936 did have the effect of reducing to a slight extent rates from the Birmingham district, but it resulted in substantial increases in many of the more important rates from the Chattanooga district, as appears from the table on page 285 of the Commission's report in 208 I. C. C. (R. 20). The effect of the Column 2 basis of rates on the revenues of the carriers,

both Northern and Southern, based on all shipments of coke moving during the year 1933 from the Birmingham district to points in the states of Illinois, Indiana, Ohio and Michigan, and during the year 1929 on all coke shipments made from Chattanooga to points in those four states, was to reduce the revenue on shipments from the Birmingham district from $508,135.32 to $484,974.97, a reduction of $23,160.35; whereas, with respect to Chattanooga, the Column 2 basis of rates resulted in an increase in revenue from $206,744.24 to $228,791.07, an increase of $22,046.83* (R. 22, 23). Combining the shipments from Birmingham and Chattanooga to destinations in the four states named, the reduction in revenue resulting from the Column 2 basis of rates, as applied to the 1933 movement from Birmingham, and the 1929 movement from Chattanooga, was only $1,113.52* (R. 22, 23). Thus it appears that, on the whole, the effect of the Column 2 basis of rates, prescribed by the Commission, was to reduce by less than two-tenths of one per cent the amount of revenue which would have been earned on the basis of rates then in effect and which had been voluntarily maintained for some years prior to the inauguration of efforts on the part of the Northern lines in 1934 to bring about increases in rates from

*While the revenue shown on the traffic from Birmingham is based on the rates which became effective March 15, 1934, following the decision of the Commission in *Coke Between Points in Central and Illinois Territories*, 194 I. C. C. 640, the revenue shown on the traffic from Chattanooga is based on rates in effect prior to March 15, 1934. Some reductions in the rates from Chattanooga concurrent with the changes made from Birmingham effective March 15, 1934, were made "to eliminate fourth-section departures" (R. 18), so that the figures shown understate, to some extent, the increase in revenue from Chattanooga, and overstate the net reduction caused by the order.

Southern producing points to the North. The fact that the rates prescribed by the Commission approximately preserved the then existing revenues of the carriers is significant as indicating the absence of any drastic action on the part of the Commission.

V.

The Weight to be Given the Evidence is for the Commission's Determination.

The weight to be given this evidence, summarized by the Commission in its report from the record before it, is a matter peculiarly for the Commission to determine, for it is well settled that, if the determination of the Commission finds substantial support in the evidence, the Courts will not weigh the evidence, nor consider the wisdom of the Commission's action.

CONCLUSION.

It is clear from this evidence summarized from the reports of the Commission, without additionally searching the voluminous record made before the Commission, that the Commission's findings and orders are fully supported by substantial evidence, are not arbitrary, unjust or contrary to the evidence of record, and are valid.

The decree of the District Court accordingly should be affirmed.

Respectfully submitted,

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March 21, 1938.

APPENDIX "A"

"XV. APPLICATIONS FOR FURTHER HEARINGS, REHEARINGS, REARGUMENTS, RECONSIDERATION, OR MODIFICATION OF ORDERS.

"(a) (Petition; filing; service.) An application for further hearing in a proceeding before final submission, for reopening a proceeding after final submission, or for rehearing, reargument, or reconsideration after decision, must be made by petition, stating specifically the grounds relied upon, filed with the commission and served by the petitioner upon all parties or attorneys who appeared at the hearing, or oral argument if had, or on brief.

"(b) (Further hearing or reopening; statement as to new evidence.) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative.

"(c) (Rehearing, reargument, or reconsideration, specification of errors.) If the application be for rehearing, reargument, or reconsideration, the matters claimed to have been erroneously decided must be specified and the alleged errors briefly stated. If thereby any order of the commission is sought to be vacated, reversed, or modified by reason of matters which have arisen since the hearing, or of consequences which would result from compliance therewith, the matters relied upon by the petitioner must be fully set forth in the petition."